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Graber v. Logan County Water Resource Bd., 598 N.W.2d 846 (N.D. 1999)

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NORTH DAKOTA

Graber v. Logan County Water Resource Bd., 598 N.W.2d 846 (N.D. 1999) (upholding Water Resources Board's findings that landowner constructed a drain without required permit and was not exempted from permit requirement, and that owner of adjacent land damaged by drainage had standing to file a complaint).

David Graber ("Graber") owned farmland in Logan County, North Dakota. A small wetland containing an outlet, and a channeled, multi-culvert artificial drainage ditch lay northwest of this farmstead. Graber claimed the ditch had been present in that location for many years. Graber cleaned out the ditch in 1967 and 1994, and placed culverts to create permanent access across the ditch in 1974 or 1975. Water from the ditch flowed east and northeast across Graber's property to farmland owned by his neighbor, Vernon Burkle ("Burkle").

In July 1995, Burkle filed a complaint with the Logan County Water Resource Board ("Board"), alleging that water from Graber's drain flooded his land and fences, and that livestock waste from Graber's feedlot operations flushed down the drain onto his property, polluting downstream waters, killing fish stocked in his slough, and sickening his own livestock. The Board conducted an on-site inspection of the ditch and its drainage, and ordered Graber to restore the slough to its original level and fill the ditch.

Graber appealed the Board's order to the district court. Upon remand, the Board dismissed Burkle's claim, stating that the complaint failed to prove that construction of the drain did not occur prior to 1957, when the state law requiring a permit to construct a drain became effective. The Board further held that work done on the drain after 1957 was merely maintenance in nature and did not increase the volume of water being discharge. Burkle appealed the Board's order.

Following a second hearing during which the parties presented additional evidence, the Board ruled that construction of the drain without a permit occurred after 1957, and the drain adversely affected Burkle's property. The Board ordered Graber to close the drain. Graber appealed, challenging the Board's closure order. The district court found that the Board's decision was not arbitrary and capricious, and affirmed. Graber appealed this decision.

This court held that the Board did not act arbitrarily, capriciously, or unreasonably in ordering Graber to close the drain. The court addressed four issues on appeal: (1) whether Graber dug the drainage ditch on his property, and therefore, needed a permit under the state law which became effective in 1957; (2) whether state law exempted Graber from the permit requirement because he dug the ditch under state or federal supervision; (3) whether Burkle had standing to file a complaint with the Board because he experienced adverse effects from

an unauthorized drain; and (4) whether Graber had obtained a prescriptive drainage easement over Burkle's land.

The court noted that the appeal of a local governing body's decision under state law limits its scope of review. The court stated that its function is to independently determine the propriety of the Board's decision, without according any special deference to the district court's decision, and that the Board's decision must be affirmed unless the Board acted arbitrarily, capriciously, or unreasonably, or no substantial evidence supports the decision.

In addressing the first issue on appeal, the court noted that Graber did not obtain a permit or flowage easements from downstream landowners prior to working on the ditch in 1967 and 1994. However, Graber claimed that state law did not require him to obtain a permit because construction of the ditch occurred before the state statute requiring drainage permits was enacted in July 1, 1957. Moreover, he performed merely maintenance work on the ditch in 1967 and 1994. The court stated that, "[t]he law in effect at the time a drain is constructed controls." The court pointed out that testimony given by several witnesses, including individuals who had previously leased the farm or had been present on the property, established that no drainage ditch existed on the property prior to July 1, 1957. The court held that the Board therefore, had not acted arbitrarily, capriciously or unreasonably in finding that construction of the ditch occurred after July 1, 1957, and thus, state law required a permit.

The court next addressed Graber's claim that state law exempted him from the permit requirement because he had constructed a drain "under the supervision of a state or federal agency." Graber and his father testified that in 1967, an agent from the local Soil Conservation Service ("SCS") office surveyed the property to determine the bottom of the lake and ditch, and in 1994, SCS had granted Graber permission to clean out the ditch. The court, however, reiterated that "supervision" requires greater involvement in a drainage project than rendering mere technical assistance. The court concluded that the Board did not act arbitrarily, capriciously or unreasonably in finding that no supervision by a federal or state agency occurred to exempt Graber from the permit requirement.

The third and fourth issues raised on appeal involved Graber's challenge to Burkle's standing to file a complaint concerning the impact of drainage on his property. The court pointed out that under North Dakota law, only a landowner experiencing flooding or adverse effects of an unauthorized drain constructed prior to January 1, 1975, can file a complaint to the Board. Graber claimed that any adverse effects experienced by Burkle were not the result of the drain, but of a dam located downstream which blocked water back onto Burkle's property. The court, however, noted that Board members conducted an on-site inspection and observed water flowing from Graber's drain onto Burkle's property. Burkle also testified that water began flowing onto his property when Graber re-dug the drain in 1994, and that this water flooded fifteen to twenty acres of his property, destroying fences,

and killing grass. Based on this evidence, the court concluded that the Board did not act arbitrarily, capriciously or unreasonably in finding that the drainage damaged Burkle's property, thereby giving him standing.

The court also addressed Graber's claim that Burkle lacked standing to file a complaint with the Board because Graber acquired a prescriptive drainage easement over Burkle's property. The court stated that a prescriptive easement on flooded land required continuous and uninterrupted adverse use for the twenty-year prescriptive period under state law. According to the court, the Board's findings revealed that Graber failed to establish that drainage over Burkle's property was continuous and uninterrupted for the twenty years. Testimony from several individuals established that no drainage occurred shortly after 1967 when Graber's father filled in the ditch, and that no drainage onto Burkle's property occurred at all from the 1970s until 1994, when Graber reopened the ditch. Accordingly, the court held, Graber did not acquire a prescriptive drainage easement over Burkle's property.

Steven Marlin

State ex rel. Sprynczynatyk v. Mills, 592 N.W.2d 591 (N.D. 1999)
(holding that the ordinary high watermark of a river is determined according to its current condition).

The State of North Dakota and Mills had competing interests in sixty-two acres of shore zone along the Missouri River. Shore zone is the area between the ordinary low watermark and the ordinary high watermark of a river. North Dakota law gives the state property rights up to the ordinary high watermark, and Mills owned the land above that boundary. Mills asserted that he held exclusive rights to the disputed shore zone because it was above the ordinary high watermark of the river prior to the operation of the Missouri River dam system.

The State instituted a declaratory judgment action to determine the parties' interests in the disputed land. In an earlier proceeding, the Supreme Court of North Dakota concluded that the State and Mills shared correlative, overlapping rights in the shore zone. Upon remand, the trial court determined the Missouri River's ordinary high watermark based on the river's current, post-dam condition. Mills appealed this judgment contending that the trial court erred in not assessing the River's ordinary high watermark according to its natural, pre-dam state.

The specific issue on appeal was whether the ordinary high watermark of a river should be determined by its current, artificial condition or by its natural, pre-dam position. The supreme court affirmed the trial court's ruling by holding that the current water line is the boundary line regardless of whether it has been affected by natural or artificial changes. Thus, the court held that the ordinary